United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7541

United States Court of Appeals

For the Second Circuit

DANIEL E. RYAN, Admr. of the Estate of Marvin George Ellsworth Mousseau,
Plaintiff,

vs.

NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC., VERMONT CONSTRUCTION COMPANY, INC., and GEORGE & ASMUSSEN, LTD.,
Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellant,

vs.

JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,
Defendant.

Civil Action No. 73-240.

ALVIN E. MARTIN,
Plaintiff,

vs.

NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC., VERMONT CONSTRUCTION COMPANY, INC., and GEORGE & ASMUSSEN, LTD.,
Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellant,

vs.

JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,
Defendant.

Civil Action No. 74-99.

On Appeal from the United States District Court for the District of Vermont in Civil Actions No. 73-240 and 74-99.

BRIEF FOR PLAINTIFFS-APPELLEES

O'CONNELL and WOLFE,
Attorneys for Plaintiffs-Appellees,
66 Margaret Street,
Plattsburgh, New York 12901.

TYLER, BRUCE and BLISS,
Attorneys for Plaintiffs-Appellees,
120 North Main Street,
St. Albans, Vermont 05478.

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A. GERALD KLEPS, REPRESENTATIVE

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BRIEF FOR PLAINTIFFS-APPELLEES

Statement of the Issues

I. Vermont Construction was not the employer of the appellees under 21 V.S.A. section 601(3); therefore Vermont Construction cannot claim immunity from common law liabil[illegible]nder 21 V.S.A. section 622.

A. The rights and remedies of appellees should be determined under the N.Y. Workmen's Compensation Law, not that of Vermont.

B. Vermont Construction was not the employer of Martin and Mousseau under 21 V.S.A. section 601(3).

C. As Vermont Construction was not their employer under Vermont statute, appellees Martin and the Estate of Mousseau can maintain a common law action against it.

II. Johnson has no duty to indemnify Vermont Construction.

III. The jury heard evidence and was instructed as to the laws of assumption of risk and contributory negligence; their findings as to the appellees' negligence should not now be disturbed.

IV. Vermont Construction owed a duty to Martin and Mousseau to provide them a safe place to work.

V. Vermont Construction is not entitled to a *pro tanto* reduction of the judgment in the amount of Workmen's Compensation paid to the subcontractor's employees.

Statement of the Case

Marvin Mousseau and Alvin Martin, both New York State residents and long-time employees of Johnson Industrial Painting Contractors of Plattsburgh, New York, were, on

September 30, 1971, working under subcontract to Vermont Construction Company, on the construction of Northeastern Vermont Regional Hospital, in St. Johnsbury, Vermont. Mousseau and Martin had just raised the scaffold from which they were to paint the exterior cement to the top of the building when the rope holding the scaffold broke, causing both men to fall. Mousseau was killed, leaving several minor children orphaned; Martin was injured. Johnson paid Workmen's Compensation benefits under New York State law.

Daniel Ryan, Mousseau's administrator, and Martin brought suit against the manufacturer of the rope (New Bedford Cordage Co.), the store from which the rope had been purchased (Reynolds and Son, Inc.), and Vermont Construction in the Federal District Court of Vermont. Vermont Construction then brought a third party action against Johnson, which was dismissed by the court on September 19, 1974. A second third party action by Vermont Construction and a claim by the plaintiffs against George and Asmussen, Ltd., a masonry subcontractor, were voluntarily dismissed. During the trial, Vermont Construction moved for a directed verdict claiming employer status under 21 V.S.A. 601 (3), plaintiffs' assumption of risk, and their freedom from responsibility to the plaintiffs. This motion was dismissed.

The jury, after one erroneous verdict, returned a verdict for the plaintiffs against Vermont Construction, finding the contractor's negligence to be 65%, that of each workman 35%. The jury found the rope manufacturer and seller not liable to plaintiffs on their product liability claims.

After the trial, Vermont Construction filed a motion for a new trial or for a judgment notwithstanding the verdict, to reduce the judgment by the amount of workmen's compensation the plaintiffs had received, and for vacation of the

court's order dismissing its third party action against Johnson. Judge Holden denied these motions; Vermont Construction now appeals.

ARGUMENT

POINT I

Vermont Construction was not the employer of the appellees under 21 V.S.A. section 601(3); therefore Vermont Construction cannot claim immunity from common law liability under 21 V.S.A. section 622.

A. The rights and remedies of appellees should be determined under the New York Workmen's Compensation Law, not that of Vermont.

21 V.S.A. section 620 states:

> If a workman who has been hired outside of this state is injured while engaged in his employer's business and is entitled to compensation for such injury under the law of the state where he was hired, he shall be entitled to enforce against his employer his rights in this state, if his rights are such that they can be reasonably determined and dealt with by the commissioner and the court in this state.

Martin and Mousseau were hired in New York, resided with their families in New York, were paid in New York, received Workmen's Compensation benefits from New York. The Vermont courts were faced with a similar situation in Grenier v. Alta Crest Farms, Inc., 115 Vt 324, 58A^2 884 (1948). A worker employed by a Massachusetts corporation under a Massachusetts contract of employment was injured in Vermont. The court held, at 886: "The rights of the parties are controlled by the Workmen's Compensation Law of Massachusetts and the commissioner may take judicial notice

of the laws and decisions of that state in determining the questions in the case at bar". That situation differs from the circumstances of Martin v. Furman Lumber Co., 134 Vt 1, 346A^2 640 (1975), cited in appellant's brief. In *Martin*, Vermont residents were involved and the Court chose to apply Vermont law because of a public policy interest; *i.e.* the families of the deceased might impose a burden on Vermont taxpayers and social institutions. The Court cited Crider v. Zurich, 380 US 39, 41 (1965): "The state where the employee lives has perhaps even a larger concern for it is there that he is expected to return; and it is on his community that the impact of the injury is apt to be most keenly felt."

"As to third-party actions, if compensation has been paid in a foreign state and suit is brought against a third party in the state of injury, the substantive rights of the employee, the subrogated insurance company and the employer are ordinarily held governed by the law of the foreign state . . ." (Larson's Workmen's Compensation Law, section 88, p. 16-131.)

New York case law has long held that a contractor may be held in common law liability to employees of the subcontractor: "The liability imposed upon a general contractor is secondary and contingent. Where the sub-contractor has secured compensation for his employees, a general contractor is under no statutory liability . . . It seems to us quite clear that the Legislature did not intend to provide exemption to the general contractor from common-law liability, at least where no statutory liability is shown to have arisen." Clark v. Monarch Engineering Co., 248 NY 107, 111-112, 161 NE 436 (1928). This case was later cited in Matter of Passarelli v. Columbia Engineering & Contracting Co., 270 NY 68, 75, 200 NE 583, 585 (1936), and in Sweezey v. Arc Electrical Con-

struction Co., 295 NY 306, 67 NE² 369 (1946): "The liability of the contractor to employees of his subcontractor is a secondary one imposed upon him by law. That this does not cause the relationship of employer-employee to spring up has been recognized by this court in *Clark* . . ." In *Sweezey*, the Court continued (at 311), "Since the general contractor has always been deemed to be a third party with respect to the subcontractor's employee, it follows that the latter can bring an action for negligence against the general contractor under Workmen's Compensation Law, section 29, subd. 1" (AA 1-2).

B. Vermont Construction was not the employer of Martin and Mousseau under 21 V.S.A. section 601(3).

The Vermont Workmen's Compensation Law 21 V.S.A. section 601(3) reads:

> 'Employer' includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer, and includes the owner or lessee of premises or other persons who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed. If the employer is insured, 'employer' includes his insurer so far as applicable.

Vermont Construction claims to fall within this definition of "employer", making it entitled to the immunity from common law liability provided by 21 V.S.A. section 633:

> The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury.

In trying to fit within the definition of employer under section 601(3), Vermont Construction claims to be "the proprietor of the business carried on at the Northeastern Hospital" (Appellant's Brief, p. 8). The cases appellant cites in support of this construction of the statute, however, do not equate "proprietor" or "owner" with "contractor", and in several, state statutes specifically define the "employer" relationship as extending to employees of a subcontractor.

In O'Boyle v. Parker-Young Company, 95 Vt. 58, 112 A 385 (1920), the defendant was in the business of manufacturing boards, and hired a contractor to have some of defendant's lumber moved. When an employee of the contractor was injured, the court found the defendant—the proprietor of the business—liable to the injured employee in workmen's compensation, therefore immune from common law liability. The relationship was strictly proprietor-contractor, not contractor-subcontractor, as in the case at bar.

In Blue Ridge Rural Electric Cooperative v. Byrd, 238 F^2 346 (1956), Blue Ridge, in the business of providing electricity, putting up poles, lines, etc., hired a contractor to aid in the line-work to "expedite its construction work" (p. 348). Again, the employer was unquestionably the owner or proprietor of the business.

In Adamson v. Okland Construction Company, 508 P^2 805 (1973), the Utah statute which appellant claims (Appellant's Brief, pp. 8-9) corresponds to 21 V.S.A. section 601(3) reads:

> Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part of process in trade or business of the employer, such contractor, and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed . . . employees of such original employer. (35-1-42 U.C.A. 1953).

The Utah statute thus differs radically in its definitions of employee and employer from the Vermont statute.

In Howard v. Vulcan, 494 F^2 1183 (1974), the applicable Louisiana statute (23:1061 of the Compensation Act) provides that the contractor's employees are to be treated as employees of the principal employer where the contractor performs work which is part of the trade, business or occupation of the principal. Unlike the Vermont statute in question, the Louisiana statute is phrased in terms of contractor and principal; it makes no mention of proprietors, or the contractor-subcontractor relationship. As is warned in Larson's Workmen's Compensation Law, Volume 2A, note 53 to section 72.31, p. 14-57: "It is imperative to observe the exact statutory language used to describe the statutory employer since it varies significantly from one jurisdiction to another."

In his Memorandum and Order denying the respective motions of the parties for judgment notwithstanding the jury's verdicts, to reduce the verdicts and for new trials (A 62-71), Judge Holden found: "The liability of Vermont Construction, the general contractor, to the employees of the subcontractor Johnson is conditional, imposed by law, in the event the subcontractor fails to secure compensation as required by 21 V.S.A. section 687 [AA 4]. Such contingent liability does not establish the relationship of employer and employee between the workmen here involved and the defendant to shield it from liability under the exclusivity provisions of 21 V.S.A. section 622" (A 68, AA2-3). In support of this, Judge Holden cites several cases, including the New York Court of Appeals decision Sweezey v. Arc Electrical Construction Co., 295 NY 306, 67 NE^2 369, 166 ALR 809 (1946), *supra.*

C. As Vermont Construction was not their employer under Vermont statute, appellees Martin and the Estate of Mousseau can maintain a common law action against it.

When the various conditions for establishing the status of statutory employer have not been met, the general contractor is in no different position from any third party liable to suit (Larson's Workmen's Compensation Law, Vol. 2A, section 72.31, p. 14-57).

Judge Holden, in his Memorandum and Order *(supra)* continues:

> While the Supreme Court of Vermont has not specifically addressed the question, it seems quite clear that it would hold the present actions are within the legislative purpose of 21 V.S.A. section 624—to restore the injured workmen's common law remedies against third party wrongdoers. See *Dubie v. Cass-Warner Corp., supra,* 125 Vt. at 479. To the extent that the exclusivity provisions of 21 V.S.A. section 622 are inconsistent with the amended provisions of section 624, [AA 3] the 1959 enactment must prevail. Troy Conference Academy v. Town of Poultney, 115 Vt. 480 (1949). (A 68-9).

In the 1966 Vermont decision Herbert v. Layman, 125 Vt. 481, 218 A.2d 706 (1966), the Court stated, at 708:

> The statute [21 V.S.A. section 624, as amended by Act No. 232 in 1959] contemplates that a cause of action lies in favor of an injured employee when caused under circumstances creating a legal liability 'in some person other than the employer;' even though he may have been awarded compensation under the Workmen's Compensation Act, and permits him also to proceed to enforce the liability of such third party for damages.
>
> Third persons who may be liable to an injured employee in a common law action include persons who do not bear the relationship of employer toward the injured

> employee, or who are not constituted employees by the statute. 101 CJS Workmen's Compensation section 985, p. 467. (cf. Sweezey v. Arc Electrical, supra.)

The wording of the Hawaiian statute (section 97—1 R.L.H. 1955) is identical to that of Vermont 21 V.S.A. section 601(3). The Hawaiian courts have held, under this statute, that a general contractor is not entitled to immunity from a tort suit brought by an employee of a sub-contractor. The court held that the general contractor was not "virtually the proprietor or operator of the business there carried on," therefore not entitled to the immunity granted to statutory employers. (Lawrence v. Yamauchi, 439 P² 669, 671 (1968)).

The decision in Thomas v. Farnsworth Chambers Co., 286 F² 270 (1960), is appropriate to this appeal. The court was construing Colorado 81-9-1 C.R.S. 1953, which provides that a person, company or corporation contracting with a subcontractor is an employer under the Workmen's Compensation Act, and is liable to pay compensation to subcontractors and their employees. However, if the subcontractor himself is an employer, and insured, then the person, company or corporation is not subject to the provisions of the section. The Court said:

> Those cases which tend to favor retention or survival of common law liability of the general contractor proceed on the basic premise that everyone is answerable for his torts in common law unless such liability is statutorily abrogated or modified. And that by preserving the right of an injured employee to pursue his common law remedy against a third party wrongdoer the legislature did not intend to exempt a general contractor from common law liability where no statutory liability attaches. In other words, "Where the subcontractor has secured compensation for his employees, a general contractor is under no statutory liability," and is subject to common law

liability. *Clark v. Monarch Engineering Co.*, 248 NY 107, 161 NE 436, 438. See *Sweezey v. Arc Electrical Construction Co.*, 295 NY 306, 67 NE2d 369, 166 ALR 809 (272).

* * *

We know of course that the basic purpose of the so-called "statutory employer" provisions in the workmen's compensation acts is to vouch-safe the benefits of the act to all employees coming within their definitive provisions and to that end to prevent evasive action by all those who are engaged in a business or enterprise coming within their coverage. An equally basic purpose of the act is to make the remedies provided under the act exclusive and to insulate the employer, liable under the act, from any other liability whatsoever. Once, however, this legislative objective is fully accomplished there seems no good reason for the further curtailment of the common law remedy. Indeed, we see no statutory reason for not saying that the immunity from common law liability granted by the act should be coexistent with the factum of statutory liability. Of course, it is within the legislative province to grant immunity from common law liability and the extent of the legislative intent is, of course, to be discerned from the particular language used in the enactments. But we ought not attribute to the legislature an intent to curtail the common law remedy unless such intent is manifest. And this is especially true where as here, we are but forecasters of what the state court may say about its state enactment. (273).

* * *

With great respect to the Colorado trial judge's interpretations of Colorado law we are nevertheless brought to the conclusion that the asserted common law right of action was not destroyed by the appellee's contingent employer liability. (273-4).

Again, the cases cited by appellant differ from this case in that a state statute unambiguously made the contractor

liable for compensation to employees of the subcontractor. In Burk v. Cities Service Oil Company of Delaware, 266 F^2 433 (1959), the contractor's immunity from common law liability was statutory under section 11 of the Oklahoma Workmen's Compensation Act. In Burris v. J. Ray McDermott and Co., 116 F Supp. 907 (1953), Louisiana statute made both principal contractor and subcontractors liable for workmen's compensation (LSA—RS. 23:1032, 23:1061, 23:1101). And in Blue Ridge Rural Electric Cooperative v. Byrd, 238 F 2^d 346 (1956), the paragraph immediately preceding that quoted in appellant's brief (p. 13) begins: "The Maryland statute like that of South Carolina provides that where a principal contractor undertakes under contract the execution of any work in the way of his trade or business and contracts with any other party as subcontractor for the execution of the whole or any part of the work, the principal contractor shall be liable to pay any workmen employed in the execution of the work any compensation under the Act which he would have been liable to pay if the workmen had been immediately employed by him" (254).

POINT II

Johnson has no duty to indemnify Vermont Construction.

It was not error for the court to deny Vermont Construction's third-party action against Johnson pursuant to Rule 14A of the Federal Rules of Civil Procedure. Although the 1963 amendment to Rule 14A allows impleader without the court's permission within 10 days after the answer is served, the Advisory Committee's Note to the amendment "makes clear that the amendment was not intended to impair the court's discretion ultimately to allow or dismiss the third-party action. As a result, the court retains the same discretion

it had prior to 1963 to refuse to entertain the third-party claim . . ." 3 Moore's Federal Practice, section 14.05(2). In granting Johnson's motion to dismiss for failure to state a claim upon which relief may be granted, Judge Holden found that there were only two exceptions to the rule of no contribution among joint tort feasors: the existence of an express agreement to indemnify, and "when the 'circumstances attending the transaction, as between the parties, are such that the law will imply the undertaking or raise an obligation on the part of one to indemnify the other.' Spaulding [v. Oakes, 42 Vt. 343, 347]," and that neither of these was present here (A 48) Appellant urges that Article XI of the contract between Johnson and Vermont Construction is an express indemnity clause. Appellees disagree. Article XI reads:

> Article XI: The subcontractor undertakes expressly to pay all the damages that could be caused to the contractor as a result of defects in his work or as a result of his defaults to terminate according to the schedule that portion of the work mentioned in the present contract. These damages might be direct or indirect, they might result from the Law in general or from the special conditions of the contract between the Contractor and the Owner. More especially the Subcontractor will be responsible for any amount that the Contractor might be obliged to pay to the Owner as a penalty for delay or for defects and also for the interest on the sums which would be withhold [sic] by the Owner as a result of such delay or defects . . . (A 320).

This is an agreement to indemnify for defects in the actual work, defects which would make the construction job unsatisfactory to the Owner. It was not intended to indemnify the contractor for injuries to the employees of the subcontractor.

In his Memorandum and Order, *supra,* Judge Holden cites New England Telephone and Telegraph Co. v. Central Ver-

mont Public Service Corp., 391 F Supp. 450 (1975) in which Judge Oakes found that one active tortfeasor may not be indemnified by another except by an express indemnification provision in the contract (A 66).

In his discussion of the second exception to the rule of no contribution among joint tortfeasors, Judge Holden wrote:

> . . . the Court is called upon to examine the original complaint of the plaintiff to ascertain whether any of the allegations might be construed as alleging circumstances which would give rise to an obligation to indemnify on a theory of active, as opposed to passive negligence. The original complaint in the instant case, as it pertains to Vermont Construction, alleged that Vermont Construction's negligent failure to comply with various statutory, as well as common law, safety requirements was a proximate cause of the plaintiffs' injuries. If these allegations are proven at trial, then the defendant Vermont Construction is guilty of active negligence . . . In brief, there are no allegations in the original complaint to justify shifting the responsibility for the negligent acts charged against principal defendant Vermont Construction to that party whom it seeks to hold as a third party defendant. See Prosser, *The Law of Torts*, (3d Ed.) section 481 (A 50-1)

Judge Holden also cited Dubie v. Cass Warner Corp., 218 A^2 604, in which he himself wrote: "With the amendment of 21 V.S.A. section 624 (V.S. '47 section 8078) by No. 232 of the Acts of 1959, specifically reversing the election provision and removing the bar formerly imposed by acceptance of Compensation, the necessity for the rule of *Towne v. Rizzico, supra* 113 Vt. 205, 211, 32 AD^2 129, no longer applies. Receipt of statutory compensation has no relevance with regard to the employee's right to sue the tortfeasor. The wrongdoer is not entitled to credit for compensation payments, from outside sources, against the damages he brought about" (596).

POINT III

The jury heard evidence and was instructed as to the laws of assumption of risk and contributory negligence; their findings as to the appellees' negligence should not now be disturbed.

In his charge to the jury, Judge Holden very carefully and clearly explained the theories of assumption of risk and contributory negligence to the jury.

> To find the plaintiff assumed the risk as I have previously explained, the burden of proving this is on VERMONT CONSTRUCTION, you must find that the defendant has established that the plaintiffs knew of the dangerous nature of the rope being used to suspend the scaffolding, that they appreciated the danger involved, that they voluntarily assented to assume the dangers of working on the unsafe scaffold and that they had a choice of taking or avoiding the risk. (T 949).

This charge follows closely the guidelines set forth in Wells v. Village of Orleans, Inc., 132 Vt. 216 (1974).

After approximately nine hours of deliberation, the jury reached a verdict. By answer to special interrogatories, the jury apportioned the negligence as between the parties. In each case, it found Vermont Construction's share of the negligence to be 65% and that of Martin or Mousseau 35%. The jury applied these percentages to the total award for damages in each case, and awarded appellee Mousseau's Estate $189,800.00 and appellee Martin $32,500.00. The jury erred, however, in also returning general verdicts against the manufacturer of the rope and the store from which it was purchased, in disregard of the court's instructions. The court re-explained its instructions, gave additional instructions, made certain the jury understood, and asked if they preferred to continue their deliberations at that time, or suspend them un-

til the next day. The jury chose to continue deliberating and within an hour amended their verdicts to general verdicts for both the rope manufacturer and seller.

Judge Holden, in his Memorandum and Order, stated that he was "satisfied that the verdicts which were finally received are fully supported by the evidence and consistent with the court's instructions" (A-66).

The jury, in making the 65% -35% apportionment, obviously took into consideration that the appellees were partially responsible, but that the negligence of Vermont Construction was far greater. Vermont Construction failed to provide proper safety belts for the appellees. The proper belts, readily available, allow the safety line to pass through as the worker ascends, and contain a locking device which would not allow the rope to pass in the opposite direction should the worker fall, keeping him always on a tight safety line (T 324). The only safety measure available to Mousseau and Martin, the hanging safety line, required them to tie it around themselves, raise the scaffold five feet, then untie the now slack line and retie it tightly. The Manual of Accident Prevention in Construction, prepared by the Associated General Contractors of America, under which this construction was to be performed, clearly states that the general contractor owes a duty to the employees of the subcontractor to supervise the work, and to provide proper safety equipment. Vermont Construction did neither (A94-95).

In appellant's brief, it is claimed that Martin and Mousseau knew the risk they were taking by not tying themselves to the safety lines, yet recklessly refused to do so. The Illinois Appellate Court, 3d Division, decision Fore v. Vermeer, 287 NE2d 526 (1972), is then cited as stating that "Assumption of the Risk is a matter of law, when the facts are undisputed and

so plain that differing conclusions cannot be drawn from them" (Appellant's Brief, 22). The facts in that case, however, make it so different as to be inapplicable here. In *Fore*, the plaintiff, injured when the brakes on the trencher he was driving failed to hold, stated in his deposition that the brakes had previously failed on him "a million times," the trencher had run away with him at least twice before, and the morning of the accident he had been forced to drive into an embankment to stop. Martin, in his testimony, stated that he had never seen workers on scaffolds tie themselves to safety lines, nor had he ever given any thought to the danger prior to the accident (A154-155).

And, certainly it must be remembered that, in this case, the death and injuries were caused by a defective rope; this is not one of the risks one going up on a scaffold would normally anticipate, and, it is not inconceivable that the safety lines, even if properly attached to the workers, might have also been defective and broken, causing the same death and injuries to the appellees.

POINT IV

Vermont Construction owed a duty to Mousseau and Martin to provide them a safe place to work.

During the trial, the jury heard the deposition of John W. Goodrich, a registered professional engineer in the State of Vermont, with over fifteen years' experience in construction contract preparation, contract negotiation, contract administration, direct superintendent and supervision of ongoing jobs (T 283 *et seq.*). Mr. Goodrich testified as to the understanding in the trade of the contract terms, the custom and usage. He read to the jury Article I of the contract between the contractor, Vermont Construction, and the sub-contractor, Johnson:

> ARTICLE I: The Subcontractor agrees to supply all the materials and to perform all the work described in Article II of the present contract . . . in accordance with the general conditions, drawings and specifications prepared by the Architect/Engineer. Said general conditions, drawings and specifications form part of the contract between the Contractor and the Owner and form also part of the present contract between the Contractor and the Subcontractor. (A319).

Mr. Goodrich then cited the sections of the general contract which, in his interpretation under the custom and usage of Vermont, made it the responsibility of the contractor to supervise the safety of all employees on the construction site, including employees of the subcontractor:

> ARTICLE 20: Accident Prevention. Precaution shall be exercised at all times for the protection of persons (including employees) and property. The safety provisions of applicable laws, building and construction codes shall be observed. Machinery, equipment, and all hazards shall be guarded or eliminated in accordance with the safety provisions of the latest edition of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not in contravention of applicable law. (A 325).

He also cited and read Articles 10, 21 (B, C, F), 22, 26, 33, 36, 37, and 49 (A 326-330):

> 49. Superintendence by Contractor. The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Architect, on the work at all times during progress, with authority to act for him. (A 330).

Mr. Goodrich testified:

> Probably a general statement would be, in a contract of this type, I would usually consider the prime contractor

> responsible for the completion of the contract in accordance with the plans and specifications and to be solely responsible for the safe and non-hazardous working conditions of any of the workmen on the contract site, whether they were a principal employee of the contractor or if they were a sub-contractor to the prime contractor, as in my opinion, he could not delegate safety down to a sub-contract level and particularly in relation to any possible hazardous conditions I would expect the prime contractor to be responsible to make sure the job is carried out in accordance with the safety provisions and the general conditions of that contract (T 296).

He testified that under the Manual of Accident Prevention, P. 58 (see Article 20, *supra*), the superintendent (of the contractor)

> should instruct his foreman to make a survey of the job to determine the points of danger which are most hazardous and which should be guarded. This should be made an essential part of the accident prevention planning campaign, one of the primary functions of all supervisors.
>
> The superintendent should: Number One, see that requirements and suggestions of safe practices are observed. Number Two, see that foremen do not require or permit their men to take unnecessary chances. Number Three, see that proper arrangements are made for the care of injuries and that all injuries are reported and cared for. (T 315).

Speaking on the use of scaffolds, Mr. Goodrich testified:

> A. From my personal experience in all phases of construction and in an operation such as this, I would personally consider it to be a hazardous situation and particularly on an initial situation of a swing scaffold of this type. On a sub-contractor, I would want to be sure that the sub-contractor's men knew what they were doing in installing the scaffolding and testing it and inspecting the apparatus.

Q. And this would, in your opinion, be the custom and usage in the trade?

A. Yes. I mean this would be the responsibility of a superintendent running his job in a safe way, as called for in the specifications. (T 322).

Even Mr. Monty, the contractor's foreman or assistant, later superintendent, the appellant's expert witness, testified:

Q. There was no other scaffolding work being done besides the scaffolding work being done by the painting contractors, is that a fair statement?

A. That is a fair statement.

Q. Now, will you agree that working in a, on a three point or a two-point swinging scaffold is a hazardous proposition?

A. Yes.

Q. And can you think of anything else that was taking place that morning on the job site, any more hazardous than what the painters using a scaffolding would be doing?

A. No, to my knowledge, I don't remember anything.

Q. Wouldn't you think that under the custom of usage of the trade, that again perhaps not you, but the man in charge, the Project Manager, if he was there, the Superintendent, if he was not, should prudently observe the most hazardous work being done on there, in order to make certain it was being done correctly?

A. Yes. (T 752-3).

From the language of the contracts, the incorporated Manual of Accident Prevention and the testimony of both appellees' and appellant's expert witnesses, it is clear that Vermont Construction had a duty to supervise such an inherently dangerous part of the construction process as the scaffolding work, even when done by a subcontractor.

Appellee Martin, in his testimony (A 95) stated that there were no representatives of the contractor present at the time

of the accident, neither was the superintendent; and that he had never been given any rules for testing scaffolding or did he know of any safety meetings.

The fact that the contractor was under a duty to supervise the entire project makes the cases cited by appellant in its brief irrelevant. The Court in Johnson v. Cal-West Construction Co., 22 Cal Rptr. 492, 493 (1962), based its decision on: "It was well established by uncontradicted evidence that Cal-West did not . . . retain any control over the scaffolding or over the work done under the subcontract . . ." West v. Morrison-Knudsen Co., 294 F Supp 1336 (1969) was decided under prior Montana case law, which clearly states that a third party beneficiary of safety clauses in a contract may not recover in the absence of a specific promise in the contract to pay damages.

There is, therefore, no reason to find erroneous Judge Holden's instructions to the jury on this issue (T 946), as quoted in Appellant's Brief, pp 28-9:

> You may also consider the general conditions of the contract for the construction of Project 1335 at St. Johnsbury: . . .
>
> It is also proper for you to consider the general conditions of the construction contract concerning supervision to be provided by the general contractor to all undertakings by the main contractor and the subcontractor.

POINT V

Vermont Construction is not entitled to a *pro tanto* reduction of the judgment in the amount of Workmen's Compensation paid to the subcontractor's employees.

In addition to the argument presented in Point II (*supra*) to this point, we cite Judge Holden's Memorandum and Order (*supra*) in which he cites Judge Oakes' opinion in New England Telephone and Telegraph Co. v. Central Vermont Public Service Corp., 391 F. Supp. 420 (1975) that "one active, or primarily liable, tortfeasor may not be indemnified by another except by an express indemnification provision in a contract." Judge Holden continues (A 66):

> The rule against indemnification would predictably incline the Supreme Court of Vermont against reducing the injured workman's recovery by the amount of compensation he has received from his employer. The Supreme Court of Vermont has said in *Dubie v. Cass-Warner Corp.*, 125 Vt. 476, 478 (1966):
>
> > Receipt of statutory compensation has no relevance with respect to the employee's right to sue the tortfeasor. The wrongdoer is not entitled to credit for compensation payments from outside sources, against the damages he brought about.

Respectfully submitted,

TYLER, BRUCE AND BLISS,
O'CONNELL AND WOLFE,
By: LOUIS E. WOLFE, Esq.,

Attorneys for the Plaintiffs-Appellees.

APPELLEES' APPENDIX

New York Workmen's Compensation Law § 29(1)

§ 29. Remedies of employees; subrogation

1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing or affording a new or additional remedy or remedies, pursue his remedy against such other subject to the provisions of this chapter. If such injured employee, or in case of death, his dependents, take or intend to take compensation, and medical benefits in the case of an employee, under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation or not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compen-

sation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Should the employee or his dependents secure a recovery from such other, whether by judgment, settlement or otherwise, such employee or dependents may apply on notice to such lienor to the court in which the third party action was instituted, or to a court of competent jurisdiction of no action was instituted, for an order apportioning the reasonable and necessary expenditures, including attorneys' fees, incurred in effecting such recovery. Such expenditures shall be equitably apportioned by the court between the employee or his dependents and the lienor. Notice of the commencement of such action shall be given within thirty days thereafter to the chairman, the employer and the insurance carrier upon a form prescribed by the chairman.

* * *

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21 V.S.A. § 622

§ 622. *Right to compensation exclusive*

The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury.

History

Source. V.S. 1947, § 8076, P.L. § 6509. G.L. § 5774. 1915, No. 164, § 7.

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21 V.S.A. § 624

§ 624. *Dual liability; claims, settlement procedure*

Where the injury for which compensation is payable under the provisions of this chapter was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but the injured employee or his personal representative may also proceed to enforce the liability of such third party for damages in accordance with the provisions of this section. If the injured employee or his personal representative does not commence the action within one year after the occurrence of the personal injury, then the employer or its compensation insurance carrier may, within the period of time for the commencement of actions prescribed by statute, enforce the liability of the third party in the name of the injured employee or his personal representative. Not less than thirty days before the commencement of suit by any party under this section, the party shall notify, by registered

* * *

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21 V.S.A. § 687

§ 687. *Security for compensation*

Employers, but not including the state, county or the municipal bodies mentioned in section 626 of this title, shall secure compensation to their employees in one or more of the following ways:

(1) By insuring and keeping insured the payment of such compensation with any corporation or reciprocal or interinsurance exchange authorized to transact the business of workmen's compensation insurance in this state;

* * *

AFFIDAVIT OF SERVICE BY MAIL

Re: Daniel E. Ryan et al vs.
New Bedford Cordage Co.
et al
76-7541

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 23rd day of March 19 77 I mailed ____ copies of a printed Brs. & App. in the above case, in a sealed, postpaid wrapper, to:

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O'Connell & Wolfe Esqs., 66 Margaret St., Plattsburg, NY 12901 Att; Lois McShane Webb Esq.

Leslie R. Johnson

Sworn to before me this

23rd day of March, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77